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No. 80-477

IN THE

Supreme Court of the United States

October Term, 1980

AD HOC '78, T. MILTON STREET,

Petitioners,

v.

ROUSE PHILADELPHIA INC.; REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA; GIMBEL BROTHERS, INC.; and the GIMBEL BROTHERS REALTY CORPORATION,

Respondents.

On Writ of Certiorari to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is A Community Organization Exercising Rights Secured Under The First Amendment When, In Order To Communicate Grievances And Promote A Change In Government Policy Regarding The Expenditure Of Public Development Monies, It Urges Others Not To Patronize Businesses In A Building Complex Which Was Substantially Developed And Being Expanded With Public Development Monies.

2. Is An Injunction Prohibiting All Speech, Handbilling, Picketing And Assembling In The City Of Philadelphia Urging A Boycott Of Businesses In A Building Complex Substantially Developed And Being Expanded With Public Development Monies Constitutional Under The First Amendment, When The Objective Of The Boycott Is To Communicate A Message To Government Regarding Policy On The Expenditure Of Public Development Funds.

3. Is The Injunction Prohibiting All Speech, Handbilling, Picketing, Assembling And Other Activity Anywhere In The City Of Philadelphia Urging A Boycott Unconstitutionally Overbroad Because It Improperly Enjoins Protected Activity Under The First Amendment.

TABLE OF CONTENTS OF PETITION

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS OF THE COURTS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT	10
I. The Decision of the Superior Court Raises Important and Novel Questions Concerning the First Amendment to the United States Constitution Which Have Not Been, But Should Be Settled by This Court	10
II. The Decision of the Superior Court Is in Conflict With Decisions of This Court and Other Federal Courts of Appeals	13
A. Political Boycotts Aimed at Changing Public Policy	13
B. The Misapplication of the Unlawful Purpose Doctrine	14
C. The Impermissible Prior Restraint on Free Expression	19
D. The Prohibition of All Speech and Other Protected Activity Based on the Protestors' Conduct	20
E. The Overbreadth of the Injunction Order	22
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

American Radio Association v. Mobile Steamship Association, 419 U. S. 215 (1974) 16

Birl v. Philadelphia Electric Co., 402 Pa. 297, 167 A. 2d 472 (1960) 17

Brandenburg v. Ohio, 395 U. S. 444 (1969) 14, 15

Buckley v. Valeo, 424 U. S. 1 (1976) 18

Carroll v. President & Com'rs of Princess Ann, 393 U. S. 175 (1968) 22

Chaplinsky v. New Hampshire, 316 U. S. 568 (1942) 15

Coates v. City of Cincinnati, 402 U. S. 611 (1971) 22

Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U. S. 127 (1960) 17

Freedman v. Maryland, 380 U. S. 51 (1964) 19, 20

Giboney v. Empire Storage & Ice Co., 336 U. S. 490 (1949) 16

Henry v. First National Bank of Clarksdale, 595 F. 2d 291 (5th Cir. 1979) 12, 13

Hughes v. Superior Court, 339 U. S. 460 (1950) 7, 14, 15, 16

Machesky v. Bizell, 414 F. 2d 283 (5th Cir. 1969) .12, 14, 17, 21, 22

Milkwagon Drivers Union of Chicago v. Meadowmoor Dairies, 312 U. S. 287 (1941) 21

Miller v. California, 413 U. S. 15 (1973) 15

Missouri v. National Organization of Women, 620 F. 2d 1301 (8th Cir. 1980), *cert. pending*, No. 79-2037, October Term, 1980 .....12, 13, 17

Near v. Minnesota, 283 U. S. 607 (1931) 19, 20

New York Times Co. v. Sullivan, 376 U. S. 254 (1964) 18

Organization For A Better Austin v. Keefe, 402 U. S. 415 (1971) 11, 15, 16, 17, 19, 20

Police Department v. Mosley, 408 U. S. 92 (1972) 8, 17, 19, 22

Thornhill v. Alabama, 310 U. S. 88 (1940) 14

United States v. New York Times, 403 U. S. 713 (1971) 19, 20

TABLE OF AUTHORITIES (Continued)

	Page
Statutes:	
15 U. S. C. §§ 1 and 2	17
28 U. S. C. § 1257(3)	1
Constitutional Provisions:	
First Amendment To The United States Constitution	i et seq.
Other Authorities:	
A Rising People, The Founding Of The United States, 1765-1789, (Historical Society of Philadelphia, 1976)	12
The Legal Intelligencer, No. 24 (2/5/79)	1
Restatement of Torts, Section 766	17

OPINIONS OF THE COURTS BELOW

The opinion of the Superior Court of Pennsylvania has not yet been reported in the official reports, Superior Court Reports, or Atlantic 2nd. It is reprinted in the appendix at p. A1. The opinion of the Court of Common Pleas has not yet been reported in Pa. D. & C. 2d, but has been published in 180 *The Legal Intelligencer* No. 24 (2/5/79). It is reprinted in the appendix at p. A21.

JURISDICTIONAL STATEMENT

The judgment of the Superior Court of Pennsylvania was entered on December 28, 1979. Appendix at p. A164. A Petition For Allowance Of Appeal was filed with the Supreme Court of Pennsylvania on January 25, 1980. The Petition For Allowance Of Appeal was denied by the Supreme Court of Pennsylvania on June 27, 1980. Appendix at p. A163. Jurisdiction to review the judgment of the Superior Court of Pennsylvania by writ of certiorari is conferred by 28 U. S. C. § 1257(3). See, *Organization For A Better Austin v. Keefe*, 402 U. S. 415 (1971).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case concerns the urging of a boycott of a publicly developed building known as the Gallery in order to petition and communicate grievances to government for the purpose of changing public policies regarding the expenditures of public development monies in the City of Philadelphia.

On August 25, 1978 a large group of minority persons gathered at 9th and Market Streets in Philadelphia to demonstrate, protest and initiate an urging of the boycott against the Gallery. "The protest inside and outside the Gallery was peaceful. There was no actual violence or threats of violence or destruction of property." Appendix at p. A30.

The Gallery is a four-level mall located in downtown Philadelphia. Respondent Rouse Corporation leases places of business within the Gallery from the governmental owner, the Redevelopment Authority of the City of Philadelphia (RDA) and subleases stores in the Gallery to approximately ninety-four merchants. Gimbels owns and operates a department store at the end of the Gallery. Appendix at p. A29. The property they own was acquired by RDA through the condemnation process. Appendix at p. A72.

RDA spent approximately 24.5 million dollars of federal Urban Renewal Funds to acquire the land and construct the Gallery. Appendix at p. A75. The monies that were used to construct the Gallery were federal Urban Renewal monies that could have been used to develop housing in local Philadelphia communities. (N. T. Vol. VIII pp. 112-113). These federal funds were used to construct the exterior shell and public areas of the building. The City of Philadelphia additionally spent over a million dollars in the construction of the Gallery. Appendix at p. A75. RDA not only owns the Gallery but also

was the developer and general contractor for construction of the Gallery. Appendix at p. A30. Inside the Gallery, on each level, there are large public areas which are not leased to Rouse. Appendix at p. A73.

The City has allocated 12 million dollars for the expansion of the current Gallery. In addition, over one hundred million dollars of public development money is proposed to be spent on the construction of the expansion of the Gallery. (N. T. Vol. VII, pp 51-53).

The protestors were led by petitioner T. Milton Street who is a representative of and Chairman of Ad Hoc '78, an association of various community organizations. Appendix at p. A30. He has been seeking to change government policy regarding the expenditure of public monies for housing and community development. Appendix at p. A24.

The protestors, as found by the trial court, were "convinced that they have been given a runaround; that the government funds have been distributed discriminatorily" and that they had "raised questions in good faith as to the fairness of the City's area allocations and designations for the use of federal funds for housing purposes." Appendix at p. 24. The trial court also found that "there is substantial and disturbing indication that the black communities may not have been fairly and equally treated. . ." Appendix at p. A24.

The trial court found that:

> In order to highlight their complaints against the manner in which the federal, state and city government have distributed government funds, the defendants selected the Gallery as a target of protest because it represents a highly successful example of an area that has received government funds in the course of urban renewal. Appendix at p. A24.

The protestors urged the public to boycott the Gallery.[1] The purpose of the boycott of the Gallery was set forth by T. Milton Street in the Common Pleas Court opinion:

> I think that Center City, Market Street East should be developed, but I think it should be developed mutually with the development of the communities. What we had hoped to happen is to *send a message to the City, to the federal government, to whomever it is necessary, that* you can develop Center City and ignore the communities if you want to, but *we will not support you as long as you continue to ignore the needs of the community, the housing needs of the communities where we live.* We will not support the Gallery, we will not support your new Gallery, we will not support your new Gallery that's coming, until you change your policy to begin to address yourself to some of the needs that we have in the community where we live. Appendix at p. A38. (emphasis added)

The Common Pleas Court found that the "motivation underlying the boycott" was that:

> The defendants feel they have come away (comparatively) empty-handed in their attempts to secure housing monies and commitments from the City of Philadelphia and the federal government. Sensing that they have exhausted their administrative and political remedies, they have embarked on a new course of action—the boycott of the Gallery.

1. The caption of the case below included all of respondents as plaintiffs and the following as defendants: Ad Hoc '78, T. Milton Street as an individual and as a representative of Ad Hoc '78, John Doe and Jane Doe and All Other Persons Acting in Concert with the Named Participants or Otherwise Participating in Their Aid.

Through this effort, they seek to communicate their grievances to the government. Appendix at p. A44. (emphasis added)

In addition to the above, the protestors demonstrated against the fact that the Gallery businesses were not owned by minorities.

The Common Pleas Court concluded that the protestors were engaged in unlawful "scapegoat boycotting." The court found that since there was "no real or actual dispute" with the Gallery or its merchants and that the Gallery was "defenseless to meet the demands of the picketers", urging the boycott was unlawful. Appendix at p. A43. The court stated that the "strategy" to "financially injure" the businesses in the Gallery through the boycott in order to communicate their grievances to government regarding expenditure of public monies, was a "malicious use" of "First Amendment rights." Appendix at pp. A44-A45. The court held that the boycott was unlawful because it was in violation of Pennsylvania tort law (inducing a refusal to deal) and the "public policy of the state" to support and develop the Gallery. Appendix at pp. A57-A58.[2]

On January 31, 1979[3] the Common Pleas Court preliminarily enjoined:

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2. The trial court also found that some of the protestors had engaged in acts of misconduct. It stated that after the temporary injunction was issued on August 31, 1978, some of the conduct was "improper, illegal and in violation of this Court's injunction order" Appendix at p. A88. The trial court however, did not issue its sweeping injunction on all speech urging a boycott of the Gallery based on the conduct of the protestors but because it was an "unlawful boycott."

3. On August 31, 1978, by agreement of the parties, the trial court had issued a temporary injunction enjoining "mass picketing and defining permissible conduct." Appendix at pp. A31-A32.

> [P]icketing, handbilling, speechmaking, demonstrating, and boycotting inside or outside the Gallery or Gimbels, . . . Appendix at p. A67.[4]

On February 28 1978 the court entered a preliminary injunction "modifying, amending and amplifying" the January 31st order. This order enjoined petitioners:

> [f]rom engaging in a (scapegoat) boycott of the Gallery or any of the businesses therein or of Gimbel Brothers, Inc., or of Rouse Philadelphia Inc., and from picketing, handbilling, speechmaking, demonstrating or taking any other action in support of a boycott of the Gallery, or any of the businesses therein, Rouse Philadelphia Inc., or Gimbel Brothers, Inc., inside or outside The Gallery or Gimbels. All picketing, handbilling, speechmaking, demonstrating or other conduct in support of such boycott is unlawful and is hereby enjoined. All such conduct in

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4. The Common Pleas Court issued an opinion and findings of facts and conclusions of law in support of its order. In addition, the court stated, Appendix at p. A64:

> We are also filing herein a Supplemental Opinion upon the assumption that our conclusions that all boycott activity must be enjoined is incorrect. In the Supplemental Opinion we have considered the manner in which boycott activity, if lawful, may be conducted.

The court then attached the supplemental opinion and an unsigned order. Appendix at p. A111.

The Common Pleas Court did not decide whether RDA was entitled to relief. The court held "there is a dispute between the defendants and the RDA insofar as the RDA is a government agency which the defendant claims is dominated by the governmental authorities and administration which the defendants accuse of discrimination." Appendix at p. A28.

furtherance or support of such unlawful boycott is prohibited in the City and County of Philadelphia. . . . Appendix at p. A159.

The January 31, and February 28, 1979 orders were appealed to the Superior Court of Pennsylvania and on December 28, 1979 the Superior Court affirmed the orders of the Common Pleas Court.[5]

In affirming the February 28, 1979 order, the Superior Court of Pennsylvania upheld an order enjoining *any* activity or speech in the City of Philadelphia which would urge the boycott of the Gallery. The Superior Court concluded that the injunction was constitutional because the activities were a "scapegoat boycott", in that the target of the boycott had no dispute with the protestors. This conclusion was apparently based on the "unlawful purpose doctrine" which holds that picketing for an unlawful purpose can be enjoined. *Hughes v. Superior Ct.*, 339 U. S. 460 (1950). The Superior Court held that urging a boycott was for an unlawful purpose because it was a "tortious interference with the business relations", extortion and it was aimed at interfering with the Commonwealth's public policy to promote the economy by building the Gallery. The Superior Court also held that the conduct of the protestors justified the sweeping injunction entered by the court.[6]

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5. Petitioner T. Milton Street also appealed a finding of civil contempt, which was also affirmed. This order is not sought to be reviewed by this Court. Petitioners seek review of that part of the December 28, 1979 order of the Superior Court which affirmed the January 31, and the February 28, 1979 orders of the Common Pleas Court.

6. The Superior Court inferred that petitioners had urged that since they were protesting the allocation of government monies, their conduct could not be regulated by the court. Petitioners have never made such an argument. Petitioners expressly recog-

On January 25, 1980 petitioners filed a petition for allowance of appeal with the Supreme Court of Pennsylvania which petition was denied on June 27, 1980.

As set forth *supra*, the First Amendment issues sought to be reviewed by this Court were raised and decided in the court of first instance, the Common Pleas Court, and the Superior Court of Pennsylvania. Petitioners sought to have these issues reviewed before the Supreme Court of Pennsylvania but their Petition For Allowance Of Appeal was denied by that Court.[7] Specifically, the First Amendment issues sought to be reviewed by this Court were raised by petitioners in briefs filed with the Common Pleas Court and decided by the court in their opinion of January 31, 1979. Appendix at pp. A32-A63. In that opinion, the court held that it could constitutionally, under the First Amendment, enjoin all speech, picketing, handbilling and demonstrating urging a boycott of the Gallery.

The First Amendment issues sought to be reviewed by this Court were also raised on appeal in briefs before the Superior Court of Pennsylvania and decided by the

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6. (Cont'd.)

nized in the Common Pleas and Superior Court that the courts can regulate the time, place and manner of First Amendment activity, *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 98 (1972) and that the court could enjoin unprotected conduct.

The Common Pleas Court issued its injunction based on its theory of scapegoat boycott and *not* the conduct of the petitioners. This is made clear by the fact that no relief was granted RDA by the Common Pleas Court because of their status as a government agency. Appendix at p. A28. If the Common Pleas Court held the conduct of the protestors justified a total ban on all speech and activity in the City of Philadelphia, the status of RDA would have been irrelevant.

7. The questions sought to be reviewed before the Pennsylvania Supreme Court appear in the Appendix, p. A166.

Superior Court of Pennsylvania in their opinion of December 28, 1979. Appendix at pp. A5-A15. The Superior Court held that the orders of the Common Pleas Court were not unconstitutional under the First Amendment.[8]

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8. Although the Superior Court made virtually no mention in its opinion of the February 28, 1979 order of the Common Pleas Court, its order of December 28, 1979 affirmed that order (Superior Court of Pennsylvania, October Term, 1979, No. 444). The scope and breadth of the injunction order of February 28, 1979 were specifically raised before the Superior Court in petitioners' briefs filed with that Court. See, e.g., Appellants' Brief In The Superior Court, pp. 12, 29, 37, 51-55, Appellants' Reply Brief In The Superior Court, pp. 1, 5, 32. It was also raised in the Petition For Allowance Of Appeal filed with the Pennsylvania Supreme Court. Appendix at p. A166.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I

The Decision of the Superior Court Raises Important and Novel Questions Concerning the First Amendment to the United States Constitution Which Have Not Been, But Should Be Settled by This Court.

The order and decision of the Superior Court upholds an injunction prohibiting *all* speech, handbilling, demonstrating and picketing anywhere in the City of Philadelphia in support of a boycott of businesses in a publicly developed building called the Gallery. The nature and scope of this order raises novel and serious questions of immediate public importance regarding the scope and application of the First Amendment.

The Common Pleas Court and the Superior Court determined that the urging of a boycott of the Gallery was unlawful because it was a "scapegoat boycott". It defined a scapegoat boycott as boycotting a target with which the boycotters have "no real or bonafide dispute" for the "purpose of protesting against and symbolizing protest against actions and conduct of third parties." Appendix at p. A10.[9] The Superior Court upheld the urging

9. The essence of this theory is that the Gallery was an inappropriate focus of petitioners' protests as it was the court's view that the petitioners' real dispute was with the state and federal governments. This conclusion is factually and logically assailable. As the court acknowledged, the protestors' message was that more city and federal funds should be directed to meet their housing needs as opposed to being expended upon commercial developments such as the Gallery and its expansion. The Common Pleas Court found that the Redevelopment Authority of the City of Philadelphia (RDA) was the agency responsible for effectuating the purposes of the Urban Redevelopment Act in the City of Philadelphia; that the RDA planned, promoted and developed the Gallery; and that over 24.5 million dollars of federal money was

of a "scapegoat boycott" as being unlawful and not protected by the First Amendment to the United States Constitution. This Court has never addressed this issue.

In enjoining the urging of a boycott because there is "no dispute" with the "target", the state appellate court failed to recognize the constitutional significance of the First Amendment's protection of political speech and association. The urging of the boycott of the Gallery was a method of communicating a valid message to government to change public policies concerning the expenditure of public funds.[10] This was clearly not a boycott organized for private economic interests and had no commercial

9. (Cont'd.)
spent on the Project with millions planned to be spent on its expansion.

In light of the issues involved in the protest it is difficult to imagine a more appropriate focus for the boycott than the Gallery. It is clear that both federal and city government play active and important roles in developing and expanding the Gallery; moreover, no matter how laudable the governmental goals in establishing the Gallery, it is precisely this policy with which the petitioners disagree.

In determining there was no "merit" to the protestors dispute with respondent Rouse regarding the lack of black owned businesses, the Superior Court erred in examining the "truth or validity" of communicative speech in a First Amendment injunction case. *Organization For A Better Austin v. Keefe,* 402 U. S. 415, 418 (1971).

10. The Common Pleas Court specifically held that:

> There is no doubt that the *defendants raise questions in good faith as to the fairness of the City's area allocations and designations for the use of federal funds for housing purposes.* Appendix at p. A24. (emphasis added)

and

> The defendants have the right to contend that the urban renewal funds used to correct circumstances of center city blight should more wisely and more fairly be used to correct circumstances of housing blight in North Central Philadelphia. Appendix at p. A28.

motivation or goal. It was urged by persons and organizations devoted to political and social goals rather than profit. In essence, it was a "political boycott", aimed at changing the policies of government. Protesting government policy is "essential political speech lying at the core of the First Amendment." *Henry v. First National Bank of Clarksdale,* 595 F. 2d 291, 303 (5th Cir. 1979), *cert. denied* 100 S. Ct. 1020 (1980).

The Superior Court cited no precedents that political boycotts for the "purpose of protesting against and symbolizing protest against actions and conduct of third parties" are unlawful. Appendix at p. A11. Numerous federal courts, however have upheld "political" boycotts against "targets" where a "dispute" existed with a governmental third party as a valid protest against government policies. *Missouri v. National Organization for Women,* 620 F. 2d 1301 (8th Cir. 1980), *cert. pending,* No. 79-2037, October Term, 1980 (boycott of convention sites in states which failed to ratify the Equal Rights Amendment); *Henry v. First National Bank of Clarksdale, supra* (boycott against businesses to protest government policies); *Machesky v. Bizell,* 414 F. 2d 283 (5th Cir. 1969) (boycott of businesses to protest government policies). The use of the political boycott as a method of protesting public policy has been an integral part of the history of free expression in this country.[11]

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11. In 1765, the Parliament of England passed the Stamp Act which imposed "stamp duties" on virtually everything written or printed in the American colonies: deeds, decrees, licenses, indentures, pamphlets and even playing cards. In Philadelphia, as a protest to the Stamp Act, persons were urged to boycott the merchants of England (who were unrelated to the dispute) by refusing to import any goods until the Stamp Act was repealed. With the help of Benjamin Franklin, who helped organize the boycott, the Stamp Act was repealed. *A Rising People, The Founding Of the*

II

The Decision of the Superior Court Is in Conflict With Decisions of This Court and Other Federal Courts of Appeals

A. Political Boycotts Aimed at Changing Public Policy

Although this Court has never decided the issue, several federal courts of appeals have held that "political" boycotts aimed at third parties to change public policy are protected activity under the First Amendment. These decisions conflict with the decision of the Superior Court.

Recently in *State of Missouri v. National Organization For Women, Inc., supra,* the Eighth Circuit upheld the right of an organization to use a politically motivated boycott against convention sites to change public policy. The National Organization for Women organized a convention boycott in all states that had not ratified the proposed Equal Rights Amendment. The effect was that the "Missouri motels and restaurants catering to the convention trade and the Missouri economy as a whole, were suffering business losses." *Id.* at 1302. Although the businesses in Missouri were powerless to meet the goals of the organization and the boycott inflicted economic harm, the Court upheld the political boycott activity under the First Amendment.[12]

Similarly, in *Henry v. First National Bank of Clarksdale, supra,* the Fifth Circuit prevented an analogous

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11. (Cont'd.)

United States, 1765-1789, Historical Society of Philadelphia, pp. 2-9, 1976.

Within the past year, this nation, as a matter of national policy has engaged in a political boycott of the Olympic Games in Moscow to protest the foreign policy of the U. S. S. R.

12. A certiorari petition in this case is pending before this Court, No. 79-2037, October Term, 1980.

effort to stop a political boycott aimed at changing public policy. That case involved a boycott conducted by the NAACP and other civil rights groups in Port Gibson, Mississippi to protest the City's racially discriminatory policies. The court noted that the boycotting groups were not in competition with the boycotted businesses, nor were they motivated by economic interests, but rather were engaged in picketing, speeches, and other communication "directed to the elimination of racial discrimination in the town." 595 F. 2d at 303. Such activities, the court found, constitute "essential political speech lying at the core of the First Amendment." *Ibid.* See also, *Machesky v. Bizell, supra.*

The Superior Court decision conflicts with the decision of these courts and requires this Court to resolve fundamental questions regarding First Amendment activity.

B. The Misapplication of the Unlawful Purpose Doctrine

The Superior Court's apparent rationale for finding "the urging of a scapegoat boycott" unlawful was based on cases where this Court has enjoined *picketing* under the "unlawful purpose doctrine." *Hughes v. Superior Court,* 339 U. S. 460 (1950). The use of this doctrine to prohibit all speech and other protected activity, in addition to picketing, is contrary to the holdings of this Court that have established the unlawful purpose doctrine. In situations involving pure speech, advocacy of an unlawful purpose is permissible. *Brandenburg v. Ohio,* 395 U. S. 444 (1969).

Following the holding in *Thornhill v. Alabama,* 310 U. S. 88 (1940), that picketing is protected by the First Amendment, this Court has held that since picketing involved some elements other than pure speech it was sub-

ject to regulations which, if applied to "pure speech",[13] would be unconstitutional.

This Court stated that it is the "speech plus" or "coercive" power of picketing which sets it apart from pure speech:

> [W]hile picketing is a mode of communication it is inseparably something more and different. Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." Mr. Justice Douglas, joined by Black and Murphy, JJ., concurring in *Bakery and Pastry Drivers & Helpers Local v. Wohl*, 315 U. S. 769, 775, 776. Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. *Hughes v. Superior Court*, 339 U. S. 460, 464-65 (1949).

The power of picketing to accomplish its goals not through reason or communication, but through other non-

13. "Pure speech" is subject to constitutional limitations but such speech falls into a few narrowly defined categories. *Miller v. California*, 413 U. S. 15 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 316 U. S. 568 (1942) (fighting words) and *Brandenburg v. Ohio, supra*, (speech causing clear and present danger of imminent lawless action.) Through the doctrine of prior restraint this Court, however, has severely limited the use of injunctive power to prohibit speech. *Organization For A Better Austin v. Keefe*, 402 U. S. 415, 419 (1971). By enjoining "pure speech" in this case, the Superior Court has violated this doctrine.

communicative means, renders it susceptible to regulation. Yet the Superior Court applied the rationale of these cases to prohibit "pure" speech and other protected activity unrelated to the picketing activity, e.g., handbilling, anywhere in the City of Philadelphia.

As to the picketing involved in this case, the Superior Court misapplied decisions of this Court which have enjoined picketing for an unlawful purpose. The thrust of those cases is that a court can enjoin picketing when it seeks to produce a result which violates state law or clearly defined public policy. *American Radio Association v. Mobile Steamship Association,* 419 U. S. 215 (1974); *Giboney v. Empire Storage and Ice Co.,* 336 U. S. 490 (1949); *Hughes v. Superior Ct., supra.*

The Common Pleas Court acknowledged that the purpose of the picketing was urging a boycott to protest against and change the discriminatory expenditure of public funds. This is not an illegal result which violates any law or clearly defined public policy. Since the *only* constitutional justification for regulating picketing is derived from the power to prohibit the result, any attempt to regulate picketing where the state could not regulate the result is patently unconstitutional; any such law would be directed to the speech rather than the action component of picketing.

The Superior Court lost sight of this derivative quality to the unlawful purpose doctrine. The court identified no possible result of the picketing which the state could legitimately regulate.[14] Instead the Court entangled itself

14. The fact that economic harm may or will result as a consequence of picketing and other protected First Amendment activity is not a basis for granting injunctive relief. Otherwise, all boycotts and picketing would be enjoinable by the mere fact that they induced others not to patronize a particular place of business. See, *Organization For A Better Austin v. Keefe, supra.*

in the very inquiry which the First Amendment is at its core designed to protect against: a judicial consideration of whether the state approves or disapproves of the *speech* itself. In short, the protestors were silenced not because their picketing sought to produce an illegal result, but because the Court disagreed with what they had to say. See, *Police Dept. of City of Chicago v. Mosley*, 408 U. S. 92, 95 (1972).

The Superior Court's conclusion that the urging of a boycott of the Gallery was for an unlawful purpose because it was a tortious interference with business relations[15] conflicts with other federal appellate courts.

These courts have recognized the constitutional right grounded in the First Amendment to urge a refusal to deal for political purposes. See, *e.g.*, *State of Missouri v. National Organization For Women, supra; Machesky v. Bizzell, supra.* Use of tort law to enjoin the urging of a politically motivated boycott is in direct violation of petitioners' First Amendment rights. See, *Organization For A Better Austin v. Keefe, supra.*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1960), this Court rejected, on First Amendment grounds, a claim that concerted efforts to secure legislation that would result in the destruction of a competitive business violated Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2. This Court stated that even if this conduct might otherwise violate the Sherman Act, the Act should not be construed so as to infringe upon First Amendment rights:

> Secondly, and of at least equal significance, such a construction of the Sherman Act would raise impor-

15. The Superior Court held that the urging of a boycott violated Section 766 of the Restatement of Torts as adopted by the Supreme Court of Pennsylvania in *Birl v. Philadelphia Electric Co.*, 402 Pa. 297, 167 A. 2d 472 (1960).

> tant constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. *Id.* at 137-138.

Similarly in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), this Court construed Alabama's defamation law so as to avoid a chilling effect upon First Amendment rights.

In *Buckley v. Valeo*, 424 U. S. 1, 22 (1976), this Court held that "like minded persons" must be able to "pool their resources in furtherance of common political goals." Conversely people holding similar beliefs should be able to withhold their resources for political purposes. By urging persons to boycott the Gallery and by taking that stand in the company of other "like minded persons", they further a common political goal and "amplify . . . the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Id.* at 22.

The Superior Court also upheld the finding of the Common Pleas Court that picketing which urged the boycott was for an unlawful purpose because it was aimed at "interfering with the Commonwealth's public policy" which promoted the building of the Gallery. State policy cannot be used as a justification for suppressing the speech component of picketing where the result sought by the picketing is lawful. To hold otherwise would prevent citizens from expressing opposition to existing state policies through picketing and speech.

Here, the result which the picketers advocate, the nondiscriminatory distribution of city and federal funds, is not contrary to any clearly defined state policy.[16]

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16. Similarly, the Superior Court's conclusory holding that the picketing was for "extortion" and therefore could be enjoined under the unlawful purpose doctrine was legally incorrect and insufficient

C. The Impermissible Prior Restraint on Free Expression

The Superior Court's order, upholds an injunction against pure speech anywhere in the City of Philadelphia urging a boycott of the Gallery, (in addition to picketing), which constitutes an impermissible prior restraint under the First Amendment and is in direct conflict with this Court's holding in *Organization For A Better Austin v. Keefe, supra.* Under this doctrine this Court has held that the First Amendment forbids the issuance of a prior or contemporaneous injunction against speech and requires instead the imposition of a subsequent penalty, whether civil or criminal, on the conduct alleged to be illegal. *Near v. Minnesota,* 283 U. S. 607 (1931). The Superior Court's citation to *Freedman v. Maryland,* 380

16. (Cont'd.)
to justify such a sweeping injunction. This alleged "extortionate" purpose was derived from two leaflets, (P-21, P-22) handed out during two days in the very beginning of the picketing. They rhetorically stated that it "was resolved by the minority and poor citizens of Philadelphia" that the parties responsible for the Gallery "pay back" to the "Black, Spanish-speaking and poor neighborhoods" the amount of "federal funds" that were "earmarked for the Gallery" and make summer jobs available for minorities. The record is clear that no discussions regarding demands for anything ever took place with Rouse, Gimbels or any of the merchants. Petitioners submit that, the trial court's and Superior Court's simple "labelling" of these events without any *legal* analysis, "extortion" and then banning all speech and other protected activity anywhere in the City of Philadelphia has set a precedent that severely conflicts with rights secured under the First Amendment. *Police Dept. v. Mosley, supra* at 101, 102. It also violates the prior restraint doctrine, see *infra* at p. 19. *Near v. Minnesota,* 283 U. S. 607 (1931); *United States v. New York Times,* 403 U. S. 713 (1971).

U. S. 51 (1965) is misplaced as this Court has treated "obscenity" separately from other areas of "pure" speech:

> *Freedman v. Maryland*, 380 U. S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), and similar cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest upon the proposition that obscenity is not protected by the freedoms of speech and press.

United States v. New York Times, 403 U. S. 713, 725 (1971), (Brennan, J., concurring).

This Court has clearly recognized that judicially imposed, as well as other types of prior restraints on pure speech or press, violate the First Amendment. *Near v. Minnesota, supra; Organization For A Better Austin v. Keefe, supra.*[17] The Superior Court's upholding the judicially imposed injunction of the "pure" speech aspects of this case is in direct conflict with these cases.

D. The Prohibition of All Speech and Other Protected Activity Based on the Protestors' Conduct

The Superior Court held that the conduct of petitioners justified enjoining all First Amendment activity in support of a boycott of the Gallery. This is in conflict with previous holdings of this Court. Although the Common Pleas Court found that some of the conduct of the demonstrators was "improper, illegal and in violation of this Court's order", Appendix at p. A88, the record shows virtually no violence or threats of violence which would justify the enjoining of all speech and First Amendment activity in the City of Philadelphia in furtherance of a boy-

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17. The exceptions set forth in *Near* clearly do not apply to the speech in the instant case.

cott of the Gallery.[18] "Free speech in the future cannot be forfeited because of dissociated acts of past violence." *Milkwagon Drivers Union of Chicago v. Meadowmoor Dairies,* 312 U. S. 287, 296 (1941). See, *Machesky v. Bizell, supra.*

The violence that existed in *Milkwagon Drivers Union v. Meadowmoor Dairies* cannot be even remotely compared to the conduct of the protestors in this case. Although the record does indicate isolated evidence of misconduct on the part of some protestors, the Common Pleas Court did not find that the protestors had engaged in a pattern of violent activities.[19]

Petitioners do not dispute that the Court has the power to impose time, place and manner regulations on the activities of the protestors. They do not dispute that mass picketing and improper conduct can be enjoined. However, the Superior Court's decision upholding the enjoining of all activity in the City of Philadelphia in support of a boycott of the Gallery based on isolated incidents of misconduct clearly "overshoots the mark" and infringes

18. The Common Pleas Court enjoined all activity urging the boycott of the Gallery because it was an unlawful boycott. The "Supplemental Opinion" makes this clear. Appendix at p. A111. If the Common Pleas Court had prohibited all First Amendment activity because of the conduct, the supplemental opinion would never have been written. The supplemental opinion defines the areas where picketing can take place based in part on the conduct of the protestors.

19. The Common Pleas Court ordered the Philadelphia Police Department to assist in monitoring the activities at the Gallery during the entire period in which the picketing took place. These reports (D-21, D-87), show that for the period that picketing took place, there was no "pattern of violent abusive behavior," Appendix p. A14. During 45 of the 65 days, the reports showed there were no incidents, or any complaints of any nature by anyone including Rouse, RDA, Gimbels or the merchants in the Gallery.

on rights clearly protected by the First Amendment to the United States Constitution. *Machesky v. Bizell, supra,* at 290.

E. The Overbreadth of the Injunction Order

Petitioners have stressed throughout this Petition that the Superior Court's order affirming an injunction prohibiting all speech and other activity in support of a boycott anywhere in the City of Philadelphia is unconstitutionally overbroad. By prohibiting *all* activity, both protected and unprotected activity, the court abridged fundamental guarantees in the full dissemination of public expression on public issues. *Coates v. Cincinnati,* 402 U. S. 611 (1971).

This Court has consistently held that:

> An Order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Shelton v. Tucker,* 364 U. S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed. 2d 231 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll v. President & Com'rs of Princess Ann, 393 U. S. 175, 183, 184 (1968). See, *Police Dept. of Chicago v. Mosley, supra* at 101, 102.

The injunction order issued on February 28, 1980 clearly does not meet that test.

CONCLUSION

For each of the foregoing reasons, petitioners respectfully submit that this Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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